II. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The petitioner in this case was convicted of a felony in the Circuit Court of the State of Oregon for the County of Lane. The petitioner was not permitted to introduce evidence of alibi because he had not filed a notice of intention to rely on alibi evidence as required by ORS 135.875. The contention of petitioner that ORS 135.875 violated his rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution was rejected on the merits by the Court of Appeals of the State of Oregon (A. 18), and review was denied by the Supreme Court of Oregon (A. 21). The jurisdiction of this Court over this cause is conferred by 28 U.S.C. § 1257(3).

The decision of the Supreme Court of Oregon declining to review this case was rendered on November 16, 1971. A motion for leave to proceed *in forma pauperis* and a petition for writ of certiorari were filed in this Court on January 21, 1972. Both the motion and petition were granted on May 30, 1972.

III. THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Section 135.875 of the Oregon Revised Statutes.

The Fifth Amendment provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Oregon Revised Statute Section 135.875 provides:

"(1) If the defendant in a criminal action proposes to rely in any way on alibi evidence, he shall, not less than five days before the trial of the cause, file and serve upon the district attorney a written notice of his prupose to offer such evidence,

which notice shall state specifically the place or places where the defendant claims to have been at the time or times of the alleged offense together with the name and residence or business address of each witness upon whom the defendant intends to rely for alibi evidence. If the defendant fails to file and serve such notice, he shall not be permitted to introduce alibi evidence at the trial of the cause unless the court for good cause orders otherwise.

"(2) As used in this section, 'alibi evidence' means evidence that the defendant in a criminal action was, at the time of commission of the alleged offense, at a place other than the place where such offense was committed."

IV. THE QUESTIONS PRESENTED

1. Does an alibi statute requiring petitioner to furnish the state with notice of his intent to rely on alibi evidence together with the names and addresses of his prospective witnesses deny the petitioner due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution if the statute does not grant him reciprocal discovery rights against the state?

2. Has the petitioner been denied due process of law and his right not to incriminate himself if the trial court refuses to allow him to take the stand and give alibi testimony in his own defense because of his failure to file a notice of alibi as required by ORS 135.875?

3. Has petitioner been denied his right to compulsory process if the trial court refuses to allow petitioner's witnesses to give alibi testimony when petitioner failed to comply with the notice provisions of ORS 135.875?

V. STATEMENT OF THE CASE

Petitioner was arrested on June 5, 1970, for the alleged sale of marijuana to an undercover police officer (R. 13). Petitioner was subsequently tried before a judge without a jury (A. 3). Miss Colleen McFadden was called as a witness for the petitioner. She testified that she and the petitioner had been at a "drive-in" movie at the time of the crime petitioner is alleged to have committed. The prosecuting attorney for the state objected to any such testimony on the grounds that petitioner had failed to give notice of alibi testimony under ORS 135.875. The objection asked that the testimony of Miss Colleen McFadden be stricken from the consideration of the court and the objection was sustained (A. 5-7).

Petitioner then took the stand and testified that he was with Miss McFadden attending a "drive-in" movie at the time the crime was alleged to have taken place. The prosecuting attorney for the state again objected to the alibi testimony of petitioner on the grounds that petitioner had failed to comply with ORS 135.875. The court sustained the objection and petitioner's own testimony was stricken from the record (A. 10-11).

Defense counsel objected to the court's rulings to exclude the testimony of Miss FcFadden and petitioner from the consideration of the court. Petitioner was convicted of the illegal sale of narcotics (A. 11-12).

The Court of Appeals of the State of Oregon rejected petitioner's claims. The Oregon Court refused to decide whether or not ORS 135.875 denied petitioner due process of law because it failed to provide petitioner with reciprocal discovery rights against the state and held the notice of alibi statute did not deny petitioner the right to testify in his own defense; his right to compulsory

process, nor his privilege against incriminating himself (A. 13).

VI. SUMMARY OF ARGUMENT

Section 135.875 of Oregon Revised Statutes provides that an accused who intends to rely on alibi as a defense, must, within five days of trial, file with the district attorney a written notice of such intent including the place where the accused claims to have been at the time of the alleged offense together with his proposed witnesses' names and addresses. If the accused does not comply with the provisions of the statute, he is not permitted to introduce alibi evidence at his trial either through the testimony of his witnesses or himself.

Although the defendant is forced to make full disclosure of his alibi defense, the State is under no obligation to make any disclosure whatsoever to defendant. The lack of reciprocal discovery rights on the part of the defendant against the State denies defendant due process of law.

A defendant in a criminal trial has a constitutional right to take the stand and give alibi testimony in his own behalf even though he may have failed to give written notice of alibi as required by statute. A defendant has a right to be heard and he has been denied his right to due process of law if he is prevented by a procedural statute from giving alibi testimony that has direct probative value on the vital issue of his guilt or innocence.

Petitioner has been denied his right to remain silent if filing a notice of alibi pursuant to ORS 135.875 is made a condition precedent to his giving alibi testimony in his own behalf.

ORS 135.875 denies an accused his right to compulsory process for obtaining witnesses by not allowing a witness to give alibi testimony on behalf of the defendant if the defendant has failed to comply with the notice provisions of the statute. This is a direct denial of defendant's Sixth Amendment right to present a defense.

VII. ARGUMENT

A.

A NOTICE OF ALIBI STATUTE REQUIRING PETITIONER TO FURNISH THE STATE WITH NOTICE OF HIS INTENT TO RELY ON ALIBI EVIDENCE TOGETHER WITH THE NAMES AND ADDRESSES OF HIS PROSPECTIVE WITNESSES DENIES THE PETITIONER DUE PROCESS OF LAW IF THE STATUTE DOES NOT GRANT HIM RECIPROCAL DISCOVERY RIGHTS AGAINST THE STATE

This Court in *Williams v. Florida*, 299 US 78, 90 S Ct 1893, 26 L Ed2d 446 (1970), upheld Florida's notice of alibi rule as imposed by Section 1.200 of Florida's Rules of Criminal Procedure (A. 16-17).[1] However, in deciding in favor of the constitutionality of Florida's rule, this Court relied heavily on that portion of the Florida alibi statute which provided for liberal discovery by the petitioner against the State. Pursuant to the Florida rule not only was the petitioner under an obligation to disclose the names and addresses of his prospective alibi witnesses, but the State had a reciprocal duty to disclose to the petitioner the names and addresses of the witnesses the State proposed to offer in rebuttal to discredit the petitioner's alibi. The penalty imposed for failure to

[1] See Appendix to Opinion of the Court, 399 US at 104.

comply with the terms of the statute was the denial of that party's right to call witnesses in order to offer alibi evidence. The penalty, as well as the obligation to give notice rested equally on the shoulders of the State and petitioner. *Williams v. Florida*, supra at 104-105.

ORS 135.875 has no such reciprocal right of discovery in favor of the criminal defendant and this omission, petitioner submits, denies him due process of law and the right to confront the witnesses the State proposes to call against him. *Williams v. Florida*, supra; *Pointer v. Texas*, 380 US 400, 85 S Ct 1064, 13 L Ed2d 923 (1965). Under the Oregon statute, the petitioner is required to submit all his prospective alibi witnesses' names and addresses so the State may interview them, obtain their statements, and then investigate their proposed testimony hoping to find something to discredit them. Unlike the Florida rule, if the State is successful in discovering evidence to rebut the accused's alibi, it is under no obligation to disclose one shred of information to the defendant. It is plain that the obligatory disclosure requirements of ORS 135.875 are a one-way street forcing full disclosure on the part of the defendant but requiring none on the part of the State. Petitioner submits that by forcing full disclosure upon the defendant and permitting none in his behalf, this statute not only tips the scales of justice against the defendant, but practically crushes him with them. In speaking of our criminal system, Mr. Justice White in *Williams v. Florida*, supra at 399 US 82, said:

> "* * * The adversary system of trial is hardly an end to itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played * * *"

ORS 135.875 not only stacks the deck in favor of the State, but allows the State to conceal its cards until they are played, while at the same time forcing petitioner to reveal his hand. This denies petitioner due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

The Court in *Williams* was very careful in limiting its decision to those alibi statutes that provided for reciprocal discovery rights and duties when it said at 399 US 82, Footnote 11:

> "We do not, of course, decide that each of these alibi notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State."

A criminal defendant's rights of discovery in Oregon are already so infinitesimal as to be practically meaningless, so that it is patently unfair to allow the State unfettered rights of discovery to defendant's prospective alibi witnesses while denying to defendant reciprocal discovery rights to the State's prospective rebuttal witnesses. The only right of discovery a defendant has in Oregon is the right to view a prior written statement of a State's witness for the purpose of cross examination of that witness at trial, but a defendant does not have the right to pre-trial discovery generally of the statements of the State's witnesses. *State v. Foster*, 242 Or 1, 407 P2d 901 (1965). The defendant also has access to any written statements of his in the hands of the police.[2] The alibi information obtained by the State is facilitated by the

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[2]ORS 133.750; ORS 133.755. See also State ex rel *Dooley v. Connal*, Or App , 475 P2d 582 (1970)

petitioner and not as a result of any independent discovery on the part of the State. Hence, no search for truth as to guilt or innocence, nor adequate due process is obtained when the petitioner divulges names, addresses and alibi information and does not have an equal right and opportunity to investigate the facts and persons which the State will use in rebuttal. Petitioner submits he should at least be granted reciprocal discovery privileges when it pertains to an alibi defense, particularly where, as in Oregon, the State is not bound to prove the date alleged in the indictment.[3] If the State is not bound by the date it alleges the crime occurs, it could not possibly be prejudiced in any way if the defendant were to be granted reciprocal discovery rights pertaining to their prospective rebuttal witnesses.

As pointed out by Mr. Chief Justice Burger in his concurring opinion in *Williams*, supra, at 399 US 106, a reciprocal notice of alibi rule would serve an important function by disposing of cases by means of negotiation without trial when both parties are made aware of what evidence each has pertaining to an alibi defense. The Oregon statute prevents just such a possible accomodation agreeable to both the State and the defense because the State is not required to make such disclosure to the defendant. Petitioner submits that the failure of ORS 135.875 to provide for such reciprocal discovery rights on behalf of a criminal defendant denies him due process of law.

The Oregon Court of Appeals held petitioner was not prejudiced by the failure of the statute to provide for reciprocal discovery because the state did not present evidence relating to the defense of alibi (A. 16-17). The logic of the Oregon Court escapes petitioner since the

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[3] *State v. Bowen*, Or App , 492 P2d 480 (1972)

reason no such evidence was introduced by the State was because the petitioner, in the first instance, was denied the right to put on any alibi evidence, thus dispensing with the necessity of the State to offer such rebuttal testimony. It is petitioner's belief that the reason the State had no duty to offer rebuttal alibi evidence was because petitioner was denied his constitutional right of compulsory process as well as his right to testify in his own behalf.[4] This, petitioner believes, should not prevent this Court from deciding the constitutionality of ORS 135.875.

B.

PETITIONER HAS BEEN DENIED HIS RIGHT TO TESTIFY IN HIS OWN DEFENSE AND HIS RIGHT TO REMAIN SILENT IF HE MUST FILE A NOTICE OF ALIBI AS REQUIRED BY ORS 135.875 IF THAT NOTICE IS MADE A CONDITION PRECEDENT TO HIS GIVING ALIBI TESTIMONY IN HIS OWN BEHALF.

1. **The petitioner may not constitutionally be denied the opportunity to offer evidence by his own testimony, tending to establish his innocence as a penalty for non-compliance with Oregon's notice requirement.**

Petitioner believes that a defendant in a criminal case has no more fundamental constitutional right than the right to offer evidence—and testify, if he so desires—on the issues relevant to his case. This right the State may not abridge, nor, as in Oregon, wholly deny for merely failing to comply with a procedural requirement whose benefits are, in petitioner's opinion, dubious at best.

[4] These points are discussed in Argument A, infra.

The right of an accused to be heard in his own behalf is a fundamental principle of modern jurisprudence, and this Court has held that, at a minimum, due process requires a defendant in a criminal case "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own." *Specht v. Patterson*, 386 US 605, 87 S Ct 1209, 18 L Ed2d 326 (1967); Cf. *Ferguson v. Georgia*, Mr. Justice Clark concurring, 365 US 570, at 601, 81 S Ct 756, 5 L Ed2d 783, at 801 (1961).

Petitioner was called to the stand to testify in his own defense as to his whereabouts at the time of the crime he was alleged to have committed. The State's prosecutor objected to any such testimony as to alibi, since petitioner had failed to comply with the statutory alibi notice requirements set forth in ORS 135.875. The objection was sustained and petitioner was denied the right to testify in his own defense (A. 11).

This Court in *Washington v. Texas*, 388 US 14, 18, 87 S Ct 1920, 18 L Ed2d 1019, 1023 (1967), speaking through former Mr. Chief Justice Warren, cited *In re Oliver*, 333 US 257, 68 S Ct 499, 92 L Ed 682 (1948), in describing

> "* * * [W]hat it regarded as the most basic ingredients of due process of law. It observed that: 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his own defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel,' 333 US, at 273, 92 L Ed at 694."

It has been and should continue to be a fundamental right in this nation to take the witness stand and be given an unalienable right to testify in one's own defense when accused of a criminal act. In the contempt case of *Hovey v. Elliott*, 167 US 409, 42 L Ed 214 (1897), this Court examined the history of the right of the defendant to be given an opportunity to be heard in his own defense as a requirement of due process of law and cited *Windsor v. McVeigh*, 93 US 277, 278, 23 L Ed 914 (1876), to the effect that:

> "The principle stated in this terse language lies at the foundation of all well ordered systems of jurisprudence. Whenever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced aginst a party *without hearing him, or giving him an opportunity to be heard*, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal," 167 US 409, at page 414 (Emphasis added).

In *Galpin v. Page*, 85 US 350, 368-9, 21 L Ed 959, 963 (1874), it was stated:

> "* * * It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard*."

Recent decisions of this Court specifically applying the various Sixth Amendment protections to State criminal proceedings add emphasis to the constitutional stature of the right to offer defensive evidence. They establish that

the accused cannot be denied the opportunity to cross-examine the witnesses against him,[5] nor may he be denied the right to compulsory process for obtaining witnesses in his own behalf. *Washington v. Texas*, supra. Similarly the defendant's right to effectively defend against the charges against him, and to offer evidence of his innocence may not be indirectly infringed by an unreasonable denial of a continuance. *Ungar v. Sarafite*, 376 US 575, 589, 84 S Ct 841, 11 L Ed2d 921 (1964).

More recently this Court held that a Tennessee statute requiring a defendant in a criminal trial to testify first or not at all violated not only the defendant's Fifth Amendment guarantee against self incrimination, but also denied him due process of law because it denied him "the guiding hand of counsel" in the timing of this critical element [the defendant's right to testify] of his defense. *Brooks v. Tennessee*, 40 USLW 4603 (U. S. June 7, 1972). The Court tacitly recognized that the right of a defendant to testify in his own behalf is constitutional in scope by saying in *Brooks*:

> "* * * While nothing we say here otherwise curtails in any way the ordinary power of a trial judge to set the order of proof, the accused and his counsel may not be restricted in deciding whether, and when in the course of presenting his defense, the accused should take the stand."

Petitioner believes the Oregon notice of alibi statute similarly abridges his right to testify in his own defense by making notice of alibi a condition to this right. This is as great an infringement of petitioner's right to due process as the statute condemned in *Brooks v. Tennessee*, supra.

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[5] *Pointer v. Texas*, supra; *Douglas v. Alabama*, 380 US 415, 85 S Ct 1074, 13 L Ed2d 934 (1965); *Barber v. Page*, 390 US 719 88 S Ct 1318, 20 L Ed2d 255 (1968).

It is petitioner's belief that ORS 135.875 unconstitutionally abridges petitioner of his right to testify in his own behalf as guaranteed by the Fourteenth Amendment to the United States Constitution.

In upholding the Florida notice of alibi rule in *Williams v. Florida*, 399 US 78, 90 S Ct 1893, 26 L Ed2d 446 (1970), this Court noted the statute had an exception which provided the defendant in a criminal action may testify as to alibi evidence without first complying with the statute, saying at 399 US 80:

> "* * * The threatened sanction for failure to comply is the exclusion at trial of the defendant's alibi evidence—*except for his own testimony*—* * *,"

The Oregon statute provides for no exception and the Oregon Courts excluded the testimony of petitioner on the basis of a purely procedural statute. This right should not be hampered by a procedural statute that permits material evidence to be withheld from the consideration by the judge or jury. The statute *did* deprive petitioner from giving alibi testimony in his own behalf unless he first complied with the notice provisions of the statute and it is precisely this artificial condition precedent defendant believes is unconstitutional. The right of the defendant to testify in his own behalf is also recognized

in ORS 139.310[6] and Article I, Section 11 of the Oregon Constitution[7]

The New York Code of Criminal Procedure, Section 295-1, is an alibi statute requiring the defendant, on the State's request, to furnish a bill of particulars setting forth the names and addresses of his prosepctive alibi witnesses, and in the event he fails to do so, the trial court may exclude such alibi testimony.

In interpreting the New York alibi statute, the New York Court of Appeals held the statute applicable to defendant's prospective witnesses only and did not prevent the defendant himself from testifying as to his whereabouts at the time of the alleged crime. *People v. Rakiec* et al, 289 NY 306, 45 NE2d 812 (1942). The court reasoned the purpose of the statute was to enable the state to learn something about defendant's prospective witnesses, but that was not necessary regarding the

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[6]"139.310 Defendant as witness. In the trial of or examination upon any indictment, complaint, information or other proceeding before any court, magistrate, jury or other tribunal against a person accused or charged with the commission of a crime, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instruction of the court, or to the discrimination of the magistrate, grand jury or other tribunal before which such testimony is given. His waiver of this right creates no presumption against him. The defendant or accused, when offering his testimony as a witness in his own behalf, gives the prosecution a right to cross-examination upon all facts to which he has testified and which tend to his conviction or acquittal.

[7]Article I, "Section 11. Rights of accused in criminal prosecution. In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; * * *"

defendant himself since the state had already fingerprinted and investigated defendant prior to trial.

The New York Court also relied on the New York Code of Criminal Procedure § 393 which provided, "The defendant in *all* cases may testify as a witness in his own behalf * * *" The court in *People v. Rakiec*, supra, held:

> "* * * The section [393] is all inclusive. The enactment of section 393 in its original form (L. 1869, ch 678) was a milestone in the progress of criminal jurisprudence and its object was to benefit the accused * * *. Section 295-1 on the other hand is contained in chapter III-A entitled 'Simplified Indictments,' all of the sections of which relate to form and procedure. It is a sound rule of construction that in the absence of express language, it will be presumed that the Legislature did not intend to defeat the main purpose and object of another legislative enactment relating to the same subject * * * nor to make a radical change in long established rules * * *."

Defendant submits the same reasoning properly applies in relation to ORS 139.310 and ORS 135.875, the latter statute being applicable only to witnesses and not to defendant because the purpose of the statute is to enable the District Attorney to investigate the defendant's prospective witnesses, and not the defendant himself, since the state has presumably done that prior to trial. To construe ORS 135.875 as denying petitioner the right to testify himself as to alibi would be directly contrary to the Fourteenth Amendment due process provision of the United States Constitution, ORS 139.310, and Article I, Section 11 of the Oregon Constitution.

The Iowa Supreme Court in *State v. Post*, 255 Iowa 573, 123 NW2d 11 (1963), and *State v. Stump*, 254 Iowa

1181, 119 NW2d 210 (1963), indicated the Iowa alibi statute, Iowa Code §777.18 [8] did not prevent the defendant from testifying as to his alibi even though no notice was given as required by the statute.

Petitioner submits there is no justification for a sanction which wholly denies him the opportunity to be heard on a material issue of his defense. The alibi-notice provisions of Oregon's statute deny petitioner his right to be heard and arbitrarily stifles his defense as a penalty for what is a purely procedural omission. Such a sanction denies petitioner due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

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[8] Iowa Code 777.18 provides:

"Where the defendant pleads not guilty and proposes to show insanity as a defense, or that he relies on an alibi or that he was at some other place at the time of the alleged commission of the offense charged, he shall, at the time he pleads or at any time thereafter, not later than four days before trial, file a written notice of this purpose, setting forth the names of the witnesses, together with the address and occupation of each, and a statement of the substance of that which the defendant expects to prove by the testimony of each of said witnesses. If the defendant files said notice less than four days before the case is set for trial, the state, on motion of the country attorney, shall be entitled to a continuance of said cause for not to exceed four days."

2. A notice statute requiring a defendant to submit in writing a notice of intention to rely on alibi witnesses to the District Attorney and requiring him to provide the District Attorney with the names and addresses of his prospective witnesses compels the defendant to be a witness against himself in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

If petitioner complies with the requirements of ORS 135.875, petitioner is compelled prior to the trial not only to give notice of his intent to testify, but he must also give the place or places where petitioner claims to have been. The effect of these requirements is to compel petitioner to divulge his testimony prior to trial. The testimony so given prior to trial is a judicial statement and can be used against petitioner along with any fruits which the state discovers as a result of the compelled testimony. It is petitioner's belief that ORS 135.875 as construed by the Oregon Court of Appeals is unconstitutional as violative of the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner submits that the Oregon Court's construction of ORS 135.875 is directly opposed to the language of the Fifth Amendment in that it forces the defendant to provide the State with the names and addresses of his prospective alibi witnesses as well as the "place or places where defendant claims to have been at the time or times of the alleged offense."

Mr. Justice Brennan, speaking for the Court in *Malloy v. Hogan*, 378 US 1, 84 S Ct 1489, 12 L Ed2d 653 (1964), extended the Fifth Amendment guarantees against self incrimination to the states by way of the Fourteenth Amendment due process clause and said:

> "* * * The 14th Amendment secures against state invasion the same privilege that the 5th Amendment guarantees against federal infringement–the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, * * * for such silence," at 378 US 8.

The penalty exacted for failure to comply with the statute is the denial fo the defendant's right to present his alibi witnesses. Defendant believes this is "compulsion" which forces him to give evidence that may incriminate. Mr. Justice Douglas in announcing the opinion of the Court in *Spevack v. Klein*, 385 US 511, 87 S Ct 625, 17 L Ed2d 574 (1967), cited the above statement from *Malloy v. Hogan*, supra, and said:

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California*, 380 US 609, 85 S Ct 1229, 14 L Ed2d 106 (19650, the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.' "

An accused who complies with the alibi notice requirements under ORS 135.875 is compelled to give prior testimony which might incriminate him, plus the added burden of being forced to take the stand in rebuttal if the state decides to use the information given by petitioner in the state's case in chief.

In *Williams v. Florida*, supra, this Court held:

> "* * * We conclude, however, as has apparently every other court that has considered the issue, that the privilege against self incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses," at 399 US 83.

Petitioner agrees with the above holding by this Court. Mr. Williams waa not being compelled to incriminate himself by divulging the name and address of his witness. The instant case is contra since the Oregon statute applies not only to witnesses but also to the criminal defendant. The Florida statute specifically exempts the defendant from giving notice because the defendant may testify regardless of compliance with the alibi statute (A. 17). In Oregon, the defendant is compelled prior to trial to give his testimony which he is going to rely upon as alibi during his trial, or be excluded from the stand entirely.

It is petitioner's belief that the statute, if complied with, is unconstitutional as in violation of the Fifth and Foruteenth Amendments to the United States Constitution.

C.

THE PETITIONER MAY NOT CONSTITUTIONALLY BE DENIED THE OPPORTUNITY TO OFFER WITNESSES IN HIS DEFENSE AS A SANCTION IMPOSED FOR NON-COMPLIANCE WITH A NOTICE REQUIREMENT.

An accused in a criminal trial has an absolute right to have compulsory process to obtain witnesses in his own behalf as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Washington v. Texas*, 388 US 14, 87 S Ct 1290, 18 L Ed2d 1019 (1967).

Petitioner respectfully submits that in holding he was not denied his right to compulsory process, the Oregon Court of Appeals and the Oregon Supreme Court in denying review, completely disregarded the rationale not only of *Washington v. Texas*, supra, but also of *State ex rel Gladden v. Lonergan*, 201 Or 163, 269 P2d 491

(1954), where the Oregon Supreme Court said at 201 Or 189:

> "The right to compulsory process for necessary and material witnesses on his behalf is a valuable right guaranteed to an accused. it is a right that cannot be denied by legislative act or failure to act. In the interests of justice, it is the duty of the courts to enforce the right. When all is said and done, in every criminal proceeding * * * the primary aim of the law is to arrive at the truth of the matter in controversy, and no obstacle should be sanctioned that would deny the presence of a competent witness who had knowledge of material facts."

The Oregon Supreme Court in *State v. Gann*, 254 Or 549, 463 P2d 570 (1969), reinforced the holding of *State ex rel Gladden v. Lonergan*, supra, indicating that the witnesses sought and denied to the defendant Gann could have changed the outcome of the case. Petitioner believes the holdings of *Gann* and *Lonergan* are correct statements of the law and should have been followed in his case.

This Court in *Washington v. Texas*, supra, held the right to offer the testimony of witnesses, and to compel their attendance was "in plain terms the right to present a defense" in order to enable a jury to decide the truth, and determined this was a fundamental element of due process of law. In *Washington*, the testimony sought was that of a co-defendant who was incompetent to testify favorably for his partner under the applicable Texas statutes. This Court decided that the defendant was denied his right to compulsory process because the State of Texas arbitrarily denied him the right to call a witness whose testimony would have been relevant to the defense. Former Mr. Chief Justice Warren, speaking for this Court said:

"We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been revelant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed," at 388 US 23.

In the instant case, petitioner was denied the right to have Miss Colleen McFadden testify he was with her at a drive-in movie at the time the crime was alleged to have occurred, because he had not submitted her name and address to the state prior to trial as required by ORS 135.875. (A. 5-7). Certainly petitioner was denied his right to present his defense as arbitrarily as the defendant in *Washington v. Texas*, supra. The testimony of Miss McFadden was relevant and material to the very heart of petitioner's case; i.e., his guilt or innocence and the refusal to allow her to testify denied petitioner his right to compulsory process.

It should be noted that the accused in *Williams v. Florida*, 399 US 78, 90 S Ct 1893, 26 L Ed2d 446 (1970), was permitted to have his witnesses testify even though he failed to comply with the provisions of the Florida alibi statute. Petitioner believes this Court indicated that the rule applied in *Washington v. Texas*, supra, would be applicable had defendant in *Williams v. Florida*, supra, not been allowed to introduce the testimony of his alibi witness. This is indicated in Footnoe 14 where the Court stated:

"We emphasise that this case does not involve the question of the validity of the threatened sanction, had petitioner chosen not to comply with the notice of alibi rule. *Whether and to what extent a State can enforce discovery rules against a defendant who fails to comply by excluding relevant, probative evidence is a question raising Sixth Amendment issues which we have no occasion to explore * * * It is enough that no such penalty was enacted here.*" (Emphasis ours)

Such a penalty was exacted on petitioner in the instant case, the effect of which was to deny him the right to present to the trial court relevant, probative evidence that could very well have proved him innocent. In short, petitioner was denied his right to present a defense which petitioner believes, contrary to the opinion of the Oregon Court of Appeals, should not be denied him on the basis of a vague public policy interest, because petitioner feels public policy could best be served by allowing a criminal defendant to present all relevant evidence that may be determinative on the issue of his guilt or innocence.

The penalty provision of ORS 135.875, denying petitioner his right to present alibi witnesses for failure to file the required notice is an "impermissible restriction" on his Sixth Amendment right to compulsory process. Cf. *Brooks v. Tennessee*, 40 USLW 4603 (U.S. June 7, 1972).

VIII. CONCLUSION

For the reasons stated, it is respectfully submitted the judgment of the court below should be reversed.

Respectfully submitted,

J. MARVIN KUHN
Deputy Public Defender
110 Labor & Industries Building
Salem, Oregon 97310